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Filed Jan. 13, 1896.

The Virginia & Alabama Coal Company, et. al.,
(INTERVENORS,)

vs.

The Central Railroad & Banking Company of Georgia, et. al.

Interventions in the case of ROWENA M. CLARKE, et. al., against the Central Railroad and Banking Company of Georgia, et. al., and other cases consolidated therewith.
In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

Number 319. November Term, 1894.

IN FIFTH CIRCUIT COURT OF APPEALS.

BRIEF OF HILL, HARRIS & BIRCH FOR APPELLANTS [INTERVENORS.]

News Printing Co., Macon.

Filed FEB 6 1895
J. M. McKee,
CLERK.

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BRIEF OF HILL, HARRIS & BIRCH FOR APPELLANTS [INTERVENORS.]

This is a suit for coal furnished by the intervenors, the Virginia & Alabama Coal Company, hereafter called the Virginia Company, and the Sloss Iron and Steel Company, hereafter called the Sloss Company, for the operation of the Central Railroad & Banking Company of Georgia, hereafter called the Central, while operated by the Richmond & Danville Railroad Company, hereafter called the Danville. All the coal was furnished within less than six months prior to the appointment of Receivers for the Central. The Central was leased to the Georgia Pacific; the Georgia Pacific was leased to the Danville; and the Danville under color of this lease was operating the Central. But for the lease, the liability of the Central to supply creditors under the rule in Fosdick vs. Schall would be undisputed; the main question in the case is with respect to the application of the rule in view of the lease.

STATEMENT OF THE CASE.

On June 1st, 1891, the Central was leased to the Georgia Pacific Railroad Company; (Lease, pp. 20--45), and on the same day the Danville (to which the Georgia Pacific was already leased) went into the possession of the Central and operated the same till March 4th, 1892, at which date the Receivers of the Central were appointed (pp. 1--2).

The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such fuel and other supplies as it then had in possession, and on the other hand obligating the lessees to pay the current debts of the lessor Company for supplies, etc. (Lease, p. 37.)

The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central. (Lease, pp. 34-35, clauses 2, 3 and 4.)

In connection with this clause in the lease, it is appropriate to notice at this point the agreed statement of facts (Record, p. 15, Clause 14) that the semi-annual interest on the Five Million Dollars of mortgage bonds of the Central was paid in January, 1892, (the order appointing the Receiver being dated March 4th, 1892.) It is also an agreed fact that during the Receivership the Central expended for betterments on its Railroad lines from the income of the roads during the Receivership, a sum much larger than the entire claim of the Intervenors. [p. 15.]

To set aside this lease, Mrs. Rowena M. Clarke, a stockholder, brought her bill against the Central under which a Receiver was appointed March 4th, 1892. The Danville and Georgia Pacific disclaimed any rights under the lease, and no issue was raised in relation thereto such as to require decision as to the validity or

invalidity of the lease; and such question has not been determined. Shortly afterwards the Central filed a dependent bill, under which the same Receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad. (The last two companies were afterwards discharged from the Receivership, to-wit: On June 16th, 1893, p. 14.) The Farmers' Loan and Trust Company, the Trustee for the mortgage bondholders of the Central, afterwards filed its dependent bill in said cases under which the same Receivership was continued. All these cases were afterwards consolidated.

On July 13th, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract is as follows: (pp. 48--49.)

RICHMOND & DANVILLE RAILROAD CO.,

OFFICE GENERAL PURCHASING AGENT,

ATLANTA, GA.

JOSEPH P. MINITREE,

General Purchasing Agent,

THE VIRGINIA & ALABAMA COAL COMPANY.

Mr. J. R. Ryan, V. P. and G. M., Birmingham, Ala.

Dear Sir—We beg to accept your verbal offer of to-day to furnish the C. R. R. & B. Co. of Ga. with say 275,000 tons of best quality engine steam coal for the next twelve months, commencing July 1st, 1891, and ending July 1st, 1892, at 90 cts. per ton of 2,000 lbs., to be delivered on cars at mines and to be shipped at times and in quantities to suit. Settlements for the coal delivered in any one month to be made on or about the 1st of the second succeeding month; and the C. R. R. & B. Co. of Ga. reserves the right to increase or decrease the monthly deliveries upon reasonable notice at any time. The Division Superintendents of the Divisions

for which the coal will be required will communicate with you as to the monthly deliveries, and all bills for coal furnished under this contract to be sent direct to the Division Superintendents. Kindly confirm this at once and oblige.

Yours truly,

(Signed.) JOSEPH P. MINITREE,

July 13th, 1891. General Purchasing Agent.

The Master found under the evidence that this was a contract with the Central. (p. 86, par. 6) The finding was based on the contract itself, and on the testimony of J. R. Ryan, Vice-President and General Manager of the Virginia Company, who testified positively that he made the contract with the Central, and that he would not have contracted except with the Central. He stated that Mr. W. H. Green, the General Manager of the Danville (after negotiations as to the terms of the contract were completed), "wrote it out in the name of the Richmond & Danville Railroad, and I told him I was compelled to reject it. He told Mr. Minitree and said, "you can contract with the Central,' and that is all I know about it." (p. 128.)

Ryan further testified that "he (Minitree) told me he was Purchasing Agent of the Central Railroad also, or I would not have signed it, because I would not have accepted it as being made by the Richmond & Danville," (p. 128.)

"Nobody told me that they would take the contract in the name of the Central; I told them that I would not take it in any other way. I said: "If you cannot make it in the name of the Central Railroad of Georgia, I cannot contract with you." I was very explicit, because I expected to have trouble with the coal mines." (p. 134.)

The reason why the witness was so positive and explicit on this point was this: Various Southern Coal

Companies had agreed not to underbid each other in the sale of coal to various corporations. The agreement was such as to give to each coal company the sale of the coal in its own natural territory (Ryan's testimony, p. 133), (Seddon's testimony, p. 312). Under this agreement the Virginia Company was bound not to sell to the Danville; but was free to sell to the Central (Ryan's testimony, page 133). Ryan testifies that he was under a "moral obligation" not to sell to the Danville, which obligation he would not violate, (pp. 134-5); that he knew in a general way of the lease, but did not know its nature; did not understand that selling to the Central was the same thing as selling to the Danville; was honest and sincere in making the contract with the Central, (p. 135.)

Afterwards Mr. Seddon, President of the Sloss Company, complained that this contract had been made. He testified: "I went to Mr. Ryan and told him that I did not think I had been properly treated in that matter, that he had made a contract with the Richmond & Danville when he said that he would not. He said he hadn't made it, 'I refused positively to do it,' and says 'I made the contract with the Central Railroad Company" and he said further that Captain Green and Capt. Minitree said they had authority to contract for that company." (p. 313).

In pursuance of this contract the Virginia Company between September 16th, 1891, and March 4th, 1892, shipped to the Division Superintendents (Curran at Macon, Dill at Savannah, and Epperson at Augusta,) coal to the amount (per contract price of 90 cents per ton) of $26,607.44. The Sloss Company, under the same contract by the consent of both parties, supplied coal to the amount of $14,359.38. All bills were made out in the name of the Central (Ryan's testimony, p. 140).

The price at which the Central got the coal was less than under the "strongest competition" ever existing in the South (Ryan's testimony, page 141.) The Central made 20 cents per ton by the contract. (Seddon's testimony, p. 313.)

E. P. Alexander, a director of the Central Railroad, testified that the lease of the Central and the taking possession thereof by the Danville, was a matter of common notoriety; that after the lease the Central carried on no business except the banking business, and had no other employees except such as "were necessary to maintaining the organization of the Railroad Company which had parted by lease with its railroad lines and shops, or the maintaining of the same;" that Joseph P. Minitree had no connection with the Central prior to the lease, but that when the lease was made his jurisdiction as purchasing agent was extended over the Railroad lines of the Central by order of W. H. Green, General Manager of the Danville; page 244–5.

The Interventions (Virginia Company's p. 45, Sloss Company's, p. 248,) sue upon the contract, the former Company suing (by amendment allowed) for the use of the latter. The Central, the Receivers thereof and the Danville (which had not then been placed in hands of Receivers) were made defendants. The defendants demurred. (Demurrer by Central, pp. 65, 270, 272, by Danville, p. 67.) The questions passed by the demurrers were reserved for the final hearing, p. 69.

None of the defendants filed answers.

By amendments (pages 70 and 274) intervenors alleged that while much of the coal was used in the operation of the Central prior to the receivership, that a large part of the coal shipped was upon the bins of the Central at the time of the appointment of the Receiver, March 4th, 1892, and that some of the coal arrived after March 4th, and likewise went into the possession of the Receivers.

No answers were made to these amendments.

The Intervenors petitioned for the production of the books and documents (coal chute reports, etc.) which would show how much of the coal was on hand as above set forth. (p. 74.)

In lieu of producing this documentary evidence, an agreement was made by Counsel for all parties that the Intervenors should appoint one expert, the Danville another and the Central another, to investigate the matter and report. The Intervenors appointed C. H. Schoolar, the Danville W. B. Starke, and the Central was represented by the local agents in charge of each coal chute station when the investigation was made. (pp. 146 148, 154–6.)

The agreement was sanctioned by the Court. (p. 78.) The investigation occupied several weeks, was very "thorough and careful," (Schoolar's testimony, p. 156,) and the reports made were unanimous. No dispute was made by the agents of the Receiver as to the correctness of the data for the report or the basis on which it was made. (Schoolars testimony, p. 156.)

After the reports were filed the Central only offered evidence tending to show an error in the amount on one bin. (p. 243.)

The Master's Report finds that coal of the Virginia Company, worth $13,735.89, was used prior to the Receivership; that coal worth $6,700.50 was on the bins at the time of the appointment of the Receiver; and that coal worth $6,171.30 was received by the Receiver after his appointment; (Report. p. 87, par. 9;) and that of the coal of the Sloss Company, coal worth $10,320.17 was used prior to the appointment of the Receiver; that coal worth $3,818.00 was on the bins March 4th, 1892, and that coal worth $776.00 arrived after the appointment of the Receivers. (Report, page 278.)

The prorata amount of the total coal of each Intervenor on the bins was arrived at as follows: The Virginia Coal Company being unable to supply the whole amount of coal under the contract, got three other companies, Sloss, Corona, and Little Warrior to supply certain portions of coal under its contract. No other company furnished coal to the Central within a year previous to the receivership. This was the finding of the Master (p. 88, par. 12). The only doubt thrown upon

this fact arose from the testimony of C. H. Schoolar, (page 159), that he saw on the books of the Central while examining its coal records, the name of the Tennessee Coal and Iron Company. This doubt was removed by the testimony of the General Manager of that Company, that it furnished no coal to the Central within a year, and that it had no claim to any of the coal on the bins (page 229). The coal of the four companies having been mingled in the bins, any separation was, of course, impossible; and they entered into an agreement *inter sese* that they would only claim as against the Receivers such part of the total coal on the bins as was in proportion to their respective debts (see agreement, page 228). This method of prorating was the only method possible. C. H. Schoolar testified, as an expert, that the method was fair and just to all parties. (p. 156.)

The Receivers deny that they could be bound by this division *inter sese*, and seek to defend against liability for any of the coal, on account, among other grounds, of the failure of proof respecting the amount of coal furnished by each Company, and on the ground that coal already paid for was mingled with that in the bins unpaid for. The evidence, however, was satisfactory to the Master, but the intervenors insist that if the proof was defective in respect to the proposed sub-division among the four companies of the coal on the bins, the lien of the coal companies for that coal as supply creditors, would still be paramount—the coal having been furnished immediately prior to the appointment of the Receivers, and constituting a preferential debt.

A question arises in the case as to the price of the coal at which the Receivers should account for the value of the coal used by them, to-wit: that received by them after their appointment, as well as that which was on the bins. The average market value of the coal of the Virginia Company used by the Receivers at the places of delivery was $2.74 per ton, (Master's Report, p. 99) making the coal so used worth $39.061.19, (Master's Report, p. 91). The average market value of the coal of the Sloss Company used by the Receivers

was $2.50 per ton (Master's Report, p. 279) making the coal worth $12,077.56.

On this branch of the case the Intervenors contended that the Receivers could not claim the benefit of the low contract price without adopting the contract. The Central insisted that the value of the coal over the contract price was due to its freight, and that the freight was earned by the Central lines.

The Master found that the contract sued on was the contract of the Central, and that the debt of the Intervenors constituted a preferential debt under the rule in the case of Fosdick vs. Schall, and gave judgment to the Intervenors for the full amount of their claims against all of the defendants, and that upon the payment of the claims by the Central that Company should be entitled to recover the amount thereof from the Danville. [Report in the Virginia Company's case, p. 80-95, Report on the Sloss Company's case, p. 274-283]. He reduced the amount by supplemental reports, [pp. 101, 284.] by deducting the value of certain coal used from the Central's bins at Augusta by the Port Royal & Augusta R. R., the Port Royal & Western Carolina R. R., and the Charlotte, Columbia & Augusta R. R.

All the defendants excepted to the Master's Report. [Exceptions of the Central, pp. 107, 287. Exceptions of Danville, pp. 103, 285]. The Intervenors excepted to the supplemental Report. [pp. 105, 299]. They insist that the railroads mentioned [except the C. C. & A.] were controlled by the Central through stock ownership, and were part of the Central system. These Corporations stated in their answers that the Central controlled them by a stock ownership, and that they were part of the Central system [p. 12-13]. They were discharged from the Receivership, June 16th, 1893. [p. 14.] Intervenors insist that the coal they used was used prior to the latter date.

The Court set aside the Master's Report and held the Central and the Receivers liable only to the extent of the coal which arrived after March 4th, 1892, and for

that, holding them liable at the contract price. [Opinion p, 351, Decree p. 357.]

The Central filed no cross appeal; and this branch of the case is disposed of, except that Intervenors insist that, if the Receivers were not liable under the contract, as adjudged by the Court, then they must account for the coal they got, at its market value, and not the lower contract price.

SPECIFICATIONS OF ERROR.

The Court did not in the opinion or decree pass upon the exceptions to the Master's Report specifically. For this reason it is difficult to comply literally with Rule 24 of this Court and to state in these specifications the "exception to the report and the action of the Court upon it;" but the rule is complied with as far as it is possible to state the action of the Court upon the exceptions, as that action may be inferred from the general tenor of the opinion and the decree. Reference is made to the assignments of error in the Record [pp. 362-8], where the assignments of error are fully set forth.

1st. The Court erred in setting aside the Master's Report. Intervenors insist that the same embodied the true law of the case and the correct findings of fact. Especially was it error to disregard the Master's finding upon questions of fact where they were amply sustained by the evidence.

2d. The Court erred in holding that the contract sued on was not a contract with the Central. Intervenors insist that it was in terms an express contract with the Central, and that the oral testimony showed conclusively that it was a contract with the Central and the Central alone.

3d. If, however, the contract was a contract made the Danville, the Court erred in holding that, for that reason, it was not binding on the Central. The Court in the decision states that "in the opinion of the Court

the Master was mistaken when he concluded that the Central was liable for the price of all the coal delivered by the Intervenors under the contract." (page 354.) This, by inference, sustains the second exception of the Central in the Virginia case (page 109) and the first exception in the Sloss case. (Pape 287.) Intervenors insist that if the lease was valid, the Danville had the right to contract on behalf of the Central for this coal, and if it was invalid, the Central would still be bound, because by the action of its stockholders and officers, it had put its franchises and property in the possession of the Danville to be operated, and would be bound by contracts which the officers of the Danville made for supplies to operate its lines.

4th. If the contract was not binding for the whole amount of the coal, the Court erred in holding that the Receivers of the Central were not liable for the coal which was on the bins at the time of the appointment of the Receivers.

5th. If the Receivers were only liable for the coal which they received in unloaded cars after their appointment (March 4th, 1892,) and if the Court was right in holding that there was no contract with the Central, then the Court erred in not holding the Receivers of the Central liable for the value of the coal so received by them at its market price at the places of delivery.

The Receivers could not repudiate the contract and at the same time adopt the contract for the purpose of getting the advantage of the low contract price on the coal which they received.

6th. The decree is not consistent. If the Receivers were liable for the coal which they received after their appointment in unloaded cars, they were equally liable for the coal which was on the bins at the date of the appointment, and of which they took possession and which they used in the operation of the Central lines. The Court found the Receivers liable for the former debt, but not the latter; and the Court gave to the Receivers the benefit of the low contract price, while at the same time refusing to enforce the contract.

The Contract Sued on is a Contract With the Central.

(a) The written contract expressly binds the Central. (page 48.) It provides that the Virginia Company is to "furnish coal to the Central Railroad and Banking Company of Georgia" for the succeeding twelve months, and that "the Central Railroad and Banking Company of Georgia reserves the right to increase or decrease the monthly deliveries." There is nothing upon the face of the contract to show any connection with the Danville, except the unimportant fact that the contract was written upon a letter-sheet having the name of the latter corporation at the top.

Contracts made with one corporation are not presumed to have been made with another.

Coggins vs. the Central Railroad Company, 62 Ga. 685.

(b) The testimony of J. R. Ryan and Thomas Seddon, quoted in the statement of the case (page of this brief) shows that the contract was explicitly with the Central and explicitly not with the Danville. The Master so finds under the evidence. The finding on disputed questions of fact should only be set aside for manifest error.

Medsker vs. Bonebrake, 108 U. S. 71.

Bridges vs. Sheldon, 7 Fed. Rep. 35.

The Court held that the making of the contract for the Central was by "a process of casuistry" (page 353) and that the "testimony of those witnesses who were parties to the contract shows indisputably that while the Central was designated as the purchasing party, the designation was fictitious." (page 354.)

No party to the contract testified save one; that was J. R. Ryan, who testified that he was free to sell coal to the Central, because his mine, being a small one, had

been left out of the combination, so far as the Central was concerned; (and if so, there was no reason whatever for any casuistry;) but that he was under a moral obligation not to sell to the Danville, and that he was honest and sincere in making the contract with the Central. See testimony quoted in statement of the case. (page of this brief.) Ryan was not impeached. It was not shown that he had any sinister interest in the case, and his evidence is certainly frank and has all the indications of coming from a reputable witness. It is not probable that a man of bad moral character would have been entrusted with the large financial interests which he represented. Nothing in the record impugns his veracity. The Court's finding, therefore, which in effect puts the brand of falsehood upon every word sworn to by Ryan, is not predicated on an evidence, nor, we submit, on any warrantable inference therefrom.

In his testimony, Ryan in speaking of the corporation described it by the name by which it is usually called in common speech, namely: "The Central." His entire examination (Record, page 128-142) and its connection with the contract in issue, shows that he was speaking of the corporation whose full legal name is the Central Railroad and Banking Company of Georgia, and which in the contract is described by all the initials of its full corporate name. Yet, strange to say, counsel for the Central in the Court below attempted to show that the Central was not bound, because they said Ryan simply spoke of "the Central" in his testimony, and did not speak of the "Central Railroad and Banking Company of Georgia." This is indeed "casuistry!"

This purely technical point, has not, however, for its support even the basis of fact. On page 134 Ryan's testimony is that he stated to the officers of the Danville "if you cannot make it (the contract) in the name of the Central *of Georgia*, I cannot contract with you."

(c) If it were true that Ryan's *motive* in making the contract with the Central was to evade the agreement that bound him not to sell to the Danville, that motive

would not affect the contract actually made. The Central cannot defend against liability for supplies actually used in operating its lines on the ground that the agreement or combination made the contract unlawful.

In fact, the result of the combination was highly beneficial to the Central in that it secured coal at a lower rate than it had ever done under free competition. It is true that under the combination the price of coal was advanced to the Richmond and Danville up to one dollar and twelve ($1.12) per ton, but the Central got coal from the Virginia Company at 90 cents per ton. (Pages 141, 313.)

If the Contract was with the Danville, it Nevertheless Binds the Central.

The Court reached the conclusion that the contract was really with the Danville, and seems to have regarded this conclusion alone as a sufficient reason for exempting the Central from liability. We insist that this is a complete *non-sequitur*. We insist that the Danville being in possession of the franchises and properties of the Central, whether legally or illegally, had the right to bind the Central for supplies necessary to its operation.

(a) It is settled law that the lease of one railroad to another does not affect any of the obligations which the lessor company owes to the public; and one of its obligations is to continue the exercise of its franchises. In performing this obligation, it is absolutely necessary that supplies should be furnished for the operation of the railroad, and the lessee company has the right to bind the lessor by contracts for the purchase of supplies where the lessor has transferred to the lessee the duty of exercising its franchises and operating the railroad as a carrier.

That there is an absence of authority on the question of liability of the lessor for contracts of the lessee in which the lessor is bound *eo nomine*, (there being no authorities on either side of the question) may, and we

think, does suggest the inference that the proposition is so plain that no one has ever had the temerity to question it.

The only doubtful point that could arise with respect to the liabilities of leased railroads is whether or not the lessor company would be liable to persons who might be injured by negligence in its operation and whose right to recover for such negligence depended on no contract. It is settled law that the lessor is liable in such cases.

> Singleton vs. the Southwestern Railroad, 70 Ga. 470.
> Redfield Law of Railway, 616.

It follows, *a fortiori*, that if the right of recovery exists independent of contract, it certainly exists where, in addition to the general public obligation, the right of recovery is given by contract binding the lessor through the agency of the lessee. To reason otherwise would seem to violate all logic. If the lessee is such an agent of the lessor that the lessor is liable for torts committed by the employees of the lessee, how much more will that agency make the lessor liable for contracts made in the name of the lessor for supplies necessary to perform its charter obligations?

(b) If the lease or the possession of the Central by the Danville was unlawful, nevertheless the Central would be bound by the contract made on its behalf by the officers of the Danville.

The Court below has so ruled in the case of the Macon Foundry and Machine Works against the defendants in this case, and we quote the ruling in part as follows:

> "The Central Railroad and Banking Company deliberately through the action of its Board of Directors, transferred its entire property to the Georgia Pacific Railway Company, an insolvent corporation, in absolute violation of the law, and instantly, without a syllable of writing, turned over the entire property, not to the Georgia Pacific, but to the Richmond and Danville Railroad Company, which then operated it, collected all of its revenue and diverted the income in that way from the proper channel, and therefore held this property in contemplation of law as a trespasser. Now, the Central Railroad did that.
>
> "The State had the right to expect, as I have said, that it would keep

its property going as a great system of transportation, as was originally designed. The parties who took the property found it necessary, of course, to carry on the business of railroad transportation. In order to do that, they found it necessary to keep up the material equipment of the road. It was the duty of the defendant Company to carry on the business; and if it selected lawfully or otherwise, an agent, to carry on the business for it, it is none the less responsible for the debt thus created, and it cannot primarily shift the the obligation on the Richmond and Danville Railroad Company. The State had the right to expect when it chartered the Central Railroad, that it would perform its duties to the public, and one of these duties was the payment of debts due and contracted for the purpose of carrying on its business as a transportation company."

(This case has not been reported, but we file a certified copy of the opinion herewith.)

The Court below, in the opinion in the present case, says that in the case quoted the debt was for the improvement on the property of the Central, and that there was "no express contract made with the Richmond and Danville as in this case;" but we respectfully submit that the rule laid down by the Court, if it be the law, as we think it is, also governs this case, namely: "It was the duty of the defendant (the Central) to carry on the business, and if it selected, lawfully or otherwise, an agent to carry on the business for it, it is none the less responsible for the debt thus created, and it cannot primarily shift the obligation on the Richmond and Danville Railroad Company." It is hardly necessary to cite authority on the proposition that a railroad company is bound to maintain its operation. We refer, however, to the case of Gates against the Boston and New York Air Line Company, 24 Am. and Eng. Ry. Cases 147, in which the Court says:

"Upon principle it would seem plain that the railroad property once devoted and assigned to public use, must remain pledged to that use; so as to carry to full completion the purpose of its creation, and that this public right existing by reason of the public exigency, demanded by the occasion and created by the exercise of the powers of the State, is superior to the property rights of corporations, stockholders and bondholders. To this effect also is the weight of authority."

Being under this obligation, the Central surrendered its property and franchises to the Danville, who took it under color of a lease from the Central Railroad to the

Georgia Pacific. Under this state of facts we think the true rule of law is embodied in the following proposition:

The rule in Fosdick vs. Schall applies, although the creditor furnishing the supplies necessary to the operation of a railroad, furnished them in pursuance of a contract made with the officer of another corporation to which the railroad company had illegally surrendered its franchises and property by which corporation it was being operated. The Railroad Company, its stockholders and bondholders, who by the act of the majority and the acquiescence of the minority, placed in possession of the railroad, a lessee, in violation of law, will not be heard to defeat the equity of a supply creditor who furnished supplies necessary for the operation and actually used in the operation of the Railroad Company, to such pretended lessee upon the faith of the earning capacity of the railroad in pursuance of a contract made with such pretended lessee. In such case the lessee, even though illegally in possession and control of the railroad, is so far the agent of the Railroad Company as to bind it by contracts for supplies necessary for its operation.

If this contract is to be repudiated, loss must fall upon the party who parted with a valuable consideration on the faith of that contract, while on the other hand, if the contract is enforced, a liability will be asserted as against the corporation and against its stockholders and bondholders.

If loss must fall upon one or the other of these two parties, it must in equity fall upon those who held out to the public the illegal agent; who put him in a position where he could say that he was authorized to bind the Railroad Company; who could induce parties to contract with him upon the faith of the earning capacity of the road.

Otherwise, if the Central Railroad Company and its stockholders and bondholders were allowed to repudiate this contract, they would be allowed to take advantage of their own wrong and of their own illegal action. If any other rule is adopted than the one now contended for,

the result would be that the Central Railroad would be allowed to plead its own wrong when sued by a party who furnished supplies to enable it to carry out its charter obligations.

The authority of an illegal lessee as the agent of the lessor has been expressly upheld in the case of Ottawa, Oswego & Fox River Valley Railroad Company vs. Black, 97 Illinois 262, in which the head note is as follows, the head note being the same as the language of the decision, on page 267:

"If a Railroad Company, without any authority to do so, leases its road to another company, the lessee will only be regarded as the servant of the company owning the road, and such company will not be by the act of leasing discharged from its contracts or released from any of its liabilities." To the same effect is the case of Hays against the same railroad. 61 Illinois 123.

In the opinion, the Court below states that "No officer of the Central, so far as the evidence discloses, was even consulted in reference" to this contract. The Court completely answers this portion of the opinion by the following sentence in another paragraph (page 333): "The Central had indeed practically abandoned its franchises under color of the lease to the Georgia Pacific, of which the Richmond and Danville had availed itself to operate the properties and receive the incomes of the Central." The testimony of E. P. Alexander (page 244) was that the Central "had no other employees except its President and Board of Directors and attorneys and such employees as were necessary for its banking business, and such only as were necessaay to maintaining the organization of a Railroad Company which had parted by lease with its railroad lines and shops or the maintaining of the same." Under this state of facts it is not strange that "no officer of the Central was consulted" about this coal contract, for the contract related to that department of business which the Central had transferred bodily to the Danville.

Income Diverted to Interest and Improvements.

The income of the Central was diverted to the payment of interest on bonds of the Central prior to the

Receivership and during the time that the coal was being delivered; and after the Receivership a larger amount than the Intervenors' debts was used in making improvements upon the Central lines.

To this effect is the agreed statement of facts. (Record, page 15, clauses 14 and 15).

In the case of Burham vs. Brown, 111 U. S. 176, the Court held even in a case where there had been no diversion by the Company or by the Receiver of the current earnings for the payment of interest on bonds, a debt incurred over eleven months before the appointment of the Receiver, for coal used in the company's locomotives, should be paid out of the income of the Receiver upon the ground that it was such a debt as it would have been the company's duty to pay out of the net earnings if the Receiver had not been appointed.

It is important to note that the bonds upon which interest was paid, as set forth in the agreed statement of facts, were not bonds of the Danville, but were the bonds of the Central and, so far as this record shows, the only bonds upon the Central system. If, therefore, these Intervenors should resort, as the Counsel for the Central insisted in the Court below they should resort, to the Court which appointed the Receivers of the Danville, and ask that these coal debts be paid out of the property or earnings of the Danville under the rule in Fosdick vs. Schall, they would be met by the statement that the earnings of the Central which might otherwise have been applied to the payment of these coal debts, had been applied to the payment of interest on the bonds of the Central, and that therefore that the proper forum in which to have recovery for these debts is that in which the Receivers of the Central were appointed. It seems to us that this reply would be conclusive.

Even if there had been no diversion of income for the payment of interest on bonds; it would be enough that the income had been diverted for the payment of improvements on the railroad property.

Persons who furnish labor, supplies and materials to a railroad, in order to keep it a going concern, are entitled to payment out of the earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as interest on the bonds, or *permanent improvements*, whereby the bondholders have been benefited, the Court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the Receiver, or, failing these, out of the proceeds of the sale.

Finance Co. of Pennsylvania vs. Charleston, C. & C. R. R. Co., 48 Fed. Rep. 188.

In the Court below, reliance was placed by the counsel for the Central on the case of Clyde against the Richmond and Danville Railroad Company, 56 Fed. Rep. p. 540. On examining this case it will be seen to have no application. The *ratio decidendi* of that case is embraced in the following statements:

1st. In that case the Intervenor had sued the Richmond and Danville Company *alone*, and had elected that company as her debtor and had merged her claim in a judgment against that company. (See page Decision 542).

2d. No question could be made in that case as to the obligation of the Railroad Company to which the supplies were furnished, for the reason that that railroad was not a party to the case before the Court (which is not true here, because the Central, which is the railroad for which the supplies were furnished, is a party to this case;) and also because in the Clyde case the mortgagees were not parties to the suit. That is not true here, because the mortgagees are parties and have filed their bill in this case as dependent upon the original Rowena M. Clarke bill, and in their dependent bill asked the Court to continue the same Receivership, which was done and which case has been consolidated by order of the Court with the other cases in which the Interventions were filed.

The case of U. S. Trust Co. vs. Wabash, etc., Co. 150 U. S. 287, relied on by counsel for the Central, contains nothing to show that the Supreme Court consid-

ered the question of the liability of the lessor company for preferential debts.

THE LOCAL LAW OF GEORGIA.

The foregoing argument rests the liability of the defendants upon the rule in Fosdick vs. Schall, which rule is a part of the general equity jurisprudence administered in the Federal Courts. Although it is true that in the case of the Central Trust Company vs. Thurman, decided by the Supreme Court of Georgia, October 4th, 1894, (not yet reported) it was held that that lien could not be recognized in a distribution of funds under the Trader's Act, yet the Federal Courts will not for that reason refuse to enforce a principle of general equity jurisprudence which is independent of local law. Besides, in the case just referred to, the Supreme Court of Georgia did not say that they would not recognize as a part of the equity jurisprudence of Georgia the rule of Fosdick vs. Schall, (that question is left open) but the case before them was a case which arose under the law of Georgia known as the Trader's Act, in pursuance of which three unsecured creditors may, before judgment, obtain an order placing the property of an insolvent debtor in the hands of a Receiver, and the decision related solely to distribution in Receiverships under that Act. The Central Receivership was not under this Statute.

Although we do not consider it as important to the ease, because we believe that the equity for which we contend is predicated upon the rule in Fosdick against Schall, yet we cite as evidence of the law of Georgia upon this subject the Act of 1876, embodied in the Code of Georgia, Section 278 (a). The Act is in two sections —all but the last sentence being embraced in Section 1. The Act is quoted as codified :

"In all cases where the business of any corporation operating a railroad, either wholly or partially, in this State, shall, by an order or decree of any court, be placed in the hands of a Receiver for the benefit of the creditors or stockholders of said corporation; it shall be the duty of said Receiver to apply

the income of said railroad to the payment of the incidental expenses necessary to the carrying on of said business, which shall include the wages of employees, wood, cross-ties and other material furnished, and which may be necessary for conducting said business, and keeping the property in repair, and the damage which may arise from the loss or injury to goods, wares and merchandise received by said road for transportation, and for injuries to persons and property, caused by the running of the cars on said road, and for which said road is now liable as a common carrier by the laws of this State; and a lien is hereby created on the gross income of said road, while in the hands of such Receiver, in favor of such creditors or claimants, superior to all other liens under the laws of this State. If said Receiver should be removed, or a vacancy occur in said office, and a successor be appointed, it shall be his duty to pay the liens herein provided for, according to their date, out of any funds in his hands as such Receiver whether such liability accrued before or after his appointment." Code 278.

The requirement of this Statute that the Receiver shall apply the income of the railroad to the payment of the incidental expenses necessary to carry on said business, clearly includes the current liabilities of the railroad for supplies necessary for the conduct of the business. It is true that this Statute made new law in Georgia in so far as it directed the Receiver to apply the income to the payment for injuries to persons and property, and was designed to change the rule which had been laid down by the Supreme Court of Georgia in Henderson vs. Walker, 55 Ga. 481, to the effect that a railroad was not liable for a personal injury to an employee resulting from the negligence of a fellow servant. By the Statute law of Georgia, railroads are liable in such cases (the common law rule having been abolished) and so far as the Statute related to this subject matter, its object was to put Receivers of railroads upon the same footing as railroads themselves; but in other respects the object of the Statute was to declare what was already recognized as the general doctrine in Courts of Equity that Receivers should apply the income of the railroad to the payment of expenses necessary to the carrying on of said business, and this not only included expenses from the date of his appointment (for which he was liable, as a matter of course, and for which it was wholly perfunctory to say by Statute that he was liable), but applied to the current supply debts incurred within a reasonable time prior to his appointment.

In one other respect besides that mentioned above, the foregoing Statute is an extension of the equity principle in Fosdick vs. Schall, to-wit: It places the rights of creditors upon the same footing whether the Receivership is for the benefit of the creditors or *stockholders* of the corporation. Under this Statute, therefore, Intervenors were entitled to the judgment they sought, independent of the Trustee of the bondholders becoming a party to the litigation and independent of the diversion of the income. It is unnecessary, however, to insist upon this point, because both of the conditions referred to are present in this case.

Although the decisions are not reported, yet, inasmuch as they are known to opposing Counsel in this case. it is permissible to state that the Court below has construed this Georgia Statute to refer to the payment of current debts for supplies, &c., contracted prior to the appointment of the Receiver; and in pursuance of that construction the Court has given judgment against the Central and its Receivers for wood and other materials furnished to the Richmond and Danville while it was operating the Central, and which the Danville used in the operation of the Central. It is also proper to state that the Court below distinguished his ruling in such cases from the decision which is the subject of the present appeal; though we are wholly unable to see the distinction.

The Central Having Received the Benefit of all the Coal Shipped by the Intervenors Under the Contract is Liable for the Whole Amount.

The Master found in his original report that all of the coal shipped by the Intervenors was actually used for the benefit of the Central; but modified his finding in a supplemental report in which he reduced his original finding by deducting therefrom certain coal which was taken from the bins of the Central at Augusta and

used by the following three railroads: The Port Royal and Augusta, the Port Royal and Western Carolina and the Charlotte, Columbia and Augusta.

In the opinion of the Court it is stated "Much of the coal was delivered directly from the mines to points on the Richmond and Danville at which the Central Railroad and Banking Company of Georgia had no possible concern." (Page 353.) And again: "Much of the coal was shipped directly to its (the Danville's) various agencies." Page 354.

We respectfully submit that these conclusions of the Court are not only wholly unwarranted by the evidence, but they are contrary to the agreement of Counsel as to the truth of the case, to the uncontradicted testimony, and that they go beyond the utmost claims made on this point by the Central's Counsel in this record.

(a) At the beginning of the case the following agreement of Counsel was made:

"It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the Intervenor to the railroad lines of the Central Railroad and Banking Company of Georgia, which was being operated by the Richmond and Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown by said exhibits.

"This agreement is made with the reservation of the right to show and to prove any error in said exhibits should it hereafter be discovered."

This agreement was signed by Lawton & Cunningham for the Central, and Henry Jackson for the Danville (page 85).

There never was any attempt afterwards made in pursuance of this reservation to prove any error in the exhibits as to the delivery of the coal along the lines of the Central, except as to trifling amounts. So far as concerns the coal that was used at Augusta by the three railroads above mentioned, that was properly delivered, because Augusta was the headquarters of Division Superintendent, Epperson, to whom coal was consigned under the contract; and, therefore, the conclusion of the Court

that some of the coal was shipped to points with which the Central had no concern, and shipped direct to various agencies of the Danville, is contrary to the solemn agreement of Counsel for the Central that all the coal was delivered to the railroad lines of the Central Railroad and Banking Company of Georgia. We respectfully submit that on questions of fact the case must abide by agreements of Counsel as to the truth of the case.

(b) The Master's report, in his seventh and eighth findings (page 86, 87 and 277), finds that the coal was delivered in pursuance of the contract and within its terms along the lines of the Central Railroad and Banking Company of Georgia.

(c) The report of the experts who represented the Intervenors and the Danville, and who testified that at each point which they visited they were assisted by the local agents whom the Central designated to assist them in making up their reports, shows that the coal (with exceptions which are trifling in quantity) was delivered along the lines of the Central Railroad and Banking Company.

(d) It was not even claimed by the Counsel for the Central in the exceptions which they filed to the Master's report, that any relatively large amount of this coal was diverted from the Central lines. We omit for the present the question as to the liability for the coal taken at Augusta by the three railroads above mentioned, and refer to the exceptions filed by Counsel for the Central to the report in the Virginia case. (See item headed Recapitulation, on page 114, where it is claimed that 448 tons of coal was delivered to "miscellaneous corporations.") These miscellaneous corporations are shown on page 113. One of them, for instance, is the Crystal Ice Company. This is a corporation (see page 19) located at Columbus, Georgia, which is one of the principal points of the Central lines; and the only legitimate inference to be drawn is that the officers operating the Central sold a small amount of coal to this Ice Company and doubtless received the money for it. The exceptions

of Counsel for the Central to the report of the Master in the Sloss case (see Recapitulation, page 296) claim that of the Sloss coal twenty-nine tons were delivered to the Georgia Southern and Florida Railroad. This railroad has headquarters at Macon, one of the principal points on the Central lines, and the only legitimate conclusion from the evidence, is that this was a small temporary loan of coal by the Central to the Georgia Southern, which was either paid for or perhaps off-set by some temporary loan which the Central may have made from that railroad. It is a well known fact that Railroad Companies sometimes accommodate each other in small and temporary transactions of this kind.

The same remark applies to the small amount of twenty-five tons delivered to the Georgia Midland Railroad (page 117.) This railroad runs from Griffin to Columbus. Both of these points are on the lines of the Central, and this trifling transaction represents either the sale or the loan of twenty-five tons.

The exceptions quoted further claim that of the Virginia Company's coal 419 tons are "unaccounted for, and of the Sloss Company's coal 158 tons are "unaccounted for;" but this is explained by the experts, who say (see testimony quoted, page 115) that this coal was probably carried on work trains; and hence no record of unloading kept. But it must be remembered that the Central's Counsel had agreed to the fact as true that the coal was delivered along the Central lines, and thus assumed the onus of showing any exception to that rule; and any deficiency or failure of proof, leaving any coal "unaccounted for," operates against the Central.

Hence, we say that except with reference to the coal used at Augusta, there is not the slightest evidence in the record to show that any except the Central Railroad obtained the benefit of the coal shipped by the Intervenors. The fact that a large amount of coal belonging to these Intervenors was found on the Central bins by the experts, and the fact that the cars which had been started from the mines prior to the 4th of March, 1892, were

taken possession of when they arrived by the agents of the Central's Receivers, shows conclusively that the coal was so shipped as to reach the proper bins on the Central.

It only remains to consider the liability of the Central for the coal, which was used at Augusta by the three railroad companies above mentioned.

1st. As to the Port Royal and Augusta and the Port Royal and Western Carolina, which will be considered together because they stand precisely on the same footing:

(a) The lease shows that the stock of these two railroads was transferred by the Central to the lessor (see page 24.) The Central filed its dependent bill in which it alleged that it controlled these railroads, and that they were a part of its system, and these railroads filed answers sworn to by their officers, in which they stated (pages 12 and 13) that they admitted that the Central was the owner of their stock and bonds, and that the Central operated these railroads as a part of its system.

The Receivership of the Central was extended over these two railroads, and they were operated by the Receivers up to as late a date as June 16th, 1893, at which time they were discharged by the order of his Honor, Judge Pardee.

By this late date all the coal that had been shipped in pursuance of the contract, had been long ago consumed, and therefore the subsequent discharge of these railroads from the Receivership does not seem to be material.

We insist in view of the above evidence as to the relation of these two corporations to the Central that if the Central is bound under the contract, or under the rule in Fosdick vs. Schall, or under the Statute of Georgia, then it is just as much bound for the coal which was used upon these two dependent and controlled lines, as upon any other part of this system.

Apparently, the Court below resolved this contention in our favor, for the opinion states, with reference to the coal received by the Receivers:

"It is true that some of this coal was delivered to the Port Royal and Augusta Railroad and the Port Royal and Western Carolina Railroad, and perhaps other railroads, but they were roads under the control of the Central, and were operated as a part of its system, and these roads have no doubt accounted to the Receivers for the coal which they received. (Page 355.)

As to the coal used by the Charlotte, Columbia and Augusta Railroad Company, the Central is, of course, liable, if we are right in the argument heretofore made, namely: that the Central was bound by the contract, either directly by its terms, or bound by it because made by the Richmond and Danville, or otherwise; because if the contract was binding, then the Central is liable to the Intervenors, even though it may have sold a part of the coal to another railroad company. The Court will have no hesitation in reaching the conclusion that in parting with this coal the Central in some way received consideration for the same. The coal was either sold to the Charlotte, Columbia and Augusta, or it may have been loaned to them in conformity with the usage to which reference has already been made, and any uncertainty as to proof makes the Central liable, by virtue of the agreement of counsel as to the fact of delivery to the Central.

If, however, the Court should be of the opinion that, under the rule of Fosdick against Schall, the Central is only liable for that portion of the coal which was used upon its own lines, then it is undoubtedly true that the supplemental report of the Master will be sustained to the extent of deducting from his original report the value of two thousand, one hundred and twenty-four tons of coal which was used by the Charlotte, Columbia and Augusta Railroad, and we respectfully insist that this certainly is the only exception that can be made to the liability of the Central for the entire amount of the coal.

The liability of the Central for the coal used on the Savannah and Western Railroad is too plain for argu-

ment. That road was placed under the Receivership by an amendment in the Rowena Clarke bill, at the hearing, alleging that the Central owned its capital stock and operated it (page 5.) It has been operated by the same Receiver as the Central since that time.

Coal on the Bins.

If the foregoing propositions are sound, the Intervenors have a preferential debt against the Central, under the rule in Fosdick vs. Schall, arising under the contract; but if the Court is of opinion that the preceding argument does not state the law of the case, Intervenors claim that, independent of the contract and because the contract is rejected as the basis of their rights, they have a claim arising on a *quantum valebat* against the Receivers of the Central for the value of their coal on the bins March 4th, 1892.

The facts upon this branch of the case are set forth in the statement of the case. It is to be noted that the Receivers filed no answer to the verified amendment alleging that they took possession of a large amount of Intervenors' coal which was unpaid for, nor to the petition alleging that their books, coal chute reports, etc., would show the amount of such coal. They raised no issue in the pleadings; but contented themselves solely with a criticism upon the proof offered by Intervenors.

(a) The division agreed upon by the coal companies (page 228) was the only possible method of pro-rating. It was perfectly fair to the Receivers, because under no circumstances could they be charged with more than the amount of coal proved to be on the bins.

(b) The evidence was satisfactory to the Master. His finding upon the question of fact is, at least, *prima facie*, correct.

(c) The evidence was satisfactory to the Court; this inference is inevitable from the fact that the Court rejected the Intervenors' claim, not upon the ground of

a want of proof, but upon the ground that the lessee got possession at the time of the lease of an equivalent amount of coal.

As to this view, adopted by the Court below, we submit:

(a) There was no evidence that the Central turned over any coal to the lessee except the recital in the lease that the lessee took the Central as a running road. Intervenors proved specifically and positively the amount of coal on hand March 4, 1892. If the fact that the lessee at the time of the lease, June 1, 1891, got possession of the Central's coal then on hand, was a matter of defense, then it was incumbent on the Central to show how much coal was on hand June 1, 1891. This was not done, nor attempted. Ryan testified that he had been making very heavy shipments—more than average shipments—just prior to the Receivership, and that the Central had a large amount of coal on hand March 4, 1892. If the coal on hand June 1, 1891, was used by the Central as a set-off, the Central should have shown at least that it was an equal amount.

(b) The argument that the Receivership should restore the status of the parties at the time of the lease is really an argument for the Intervenors. For the Court below in calling attention to the fact that the lessee took the lessor's supplies as a running road, ignores the concomitant fact that the lessee also assumed and paid the current debts for supplies. (Lease, page 37.) Complete adjustment of the relations of the parties requires that the Central, which took the supplies March 4, 1892, should pay the current debts for those supplies.

The true view, however, is that this matter is wholly one for accounting between the Central and Danville, and it cannot affect in any way the rights of the Intervenors.

But the Counsel for the Central do not rest their contention upon the view taken by the Court. They attack the sufficiency of the evidence, although that was

satisfactory to the Master and apparently so to the Court. The mode of arriving at the amount of the coal on the bins has been set forth in the statement of facts. Expert testimony shows it was the only method possible, and that it was fair and just. But the Central insists that in the 18,426 tons on the bins, there was probably some coal that had been paid for, and perhaps even some that the Central had on hand June 1, 1891. But this is manifestly far-fetched and practically impossible. Ryan testified that the Central usually kept on hand two or three weeks supply of coal (p. 130); so that the 18,426 tons on bins March 4, 1892, was coal that had been recently shipped, and which is represented by the later items in the account. The coal on hand, June 1, 1891, and the coal represented by the oldest items of the accounts of the coal companies had been consumed months before; and the supply renewed probably as often as ten times before the particular supply on hand March 4, 1892, was placed in the bins. The contract itself provides "settlements for the coal delivered in any one month, to be made on or about the first of the *second succeeding month*." So that there is no ground for the contention that any of the coal had been on hand long enough to be paid for.

The retention and use by the Receivers of the coal on the bins was an adoption of the contract.

Sunflower Oil Co. vs. Wilson, 142 U. S., 313, page of decision, 322.

The Receivers were liable for this coal as well as for that which arrived after March 4, 1892. Their liability for the latter is not now denied.

But if the contract be ignored, then the claim of Intervenors for the coal on the bins is a charge for which the Intervenors have a lien, under section 278 (a) of the Code, according to the construction insisted upon by counsel for the Central; and since the claim rests on *quantum valebat*, it is a debt for the coal at its market value at the places of delivery. This proposition is discussed under the next head.

Receivers Liable for Coal, if Contract Ignored, at Market Value.

When this branch of the case is reached, the logic of the counsel for the Central takes a complete somersault. Throughout the whole discussion, their argument ceaselessly reiterates Danville, *Danville*, DANVILLE. But when the Intervenors, for the sake of the argument, meet them upon their own ground and assume that the contract is not in the case and therefore charge the Central with the proven market value of the coal at the places of delivery, presto! our opponents throw down the Danville cloak in which they have been hiding and in all the nakedness of truth exclaim, "We, *the Central*, hauled the coal, earned the freight which gave to the coal its market value, and therefore, *we*, the Central, claim the benefit of the contract price.

But the contention, in addition to its grotesque inconsistency, does not rest upon any sufficient evidence. The average price of coal at the mines for 1891–2, was (not 90 cents as per this contract) but $1.02 (page 306): and the freight from the mines to Birmingham, which was not over the Central lines, which the coal companies paid, was 25 cents per ton; thus adding a total of 37 cents per ton to the value at Birmingham. Hence there is no consistent theory on which the Receivers can get the benefit of the low contract price except the Intervenors theory, that the contract is to be enforced as the measure of the rights of the parties.

Walter B. Hill.
Sols for Intervenors